In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 746

FORD M. CONVERSE, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A15) is reported at 399 F. 2d 616. The opinion of the district court (Pet. App. A17–A42) is reported at 262 F. Supp. 583. The decision of the Secretary of the Interior (Pet. App. A42–A62) is reported at 72 I.D. 141.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1968. A petition for rehearing was denied on October 7, 1968. The petition for a writ of certiorari was filed on November 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent portions of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368–371, 30 U.S.C. 612(a), 612(b), 613(a), 613(c), 613(e), are set forth in the Appendix to this brief, *infra*, pp. 6–12.

QUESTIONS PRESENTED

1. Whether the proper statutory procedures were followed within the Department of the Interior in determining that the United States is to manage the surface resources of petitioner's unpatented mining claims.

2. Whether the courts below properly found that the factual determination by the Secretary of the Interior that there had been no valid discovery of minerals as of the requisite date was supported by substantial evidence.

STATEMENT

1. Section 4 of the Surface Resources Act of 1955 generally reserved to the United States the right to manage and dispose of the surface resources of mining claims which are located after the passage of the Act.[1] The Act does not interfere with a prospector's right to continue to seek minerals on the public domain and to apply for and obtain a fee patent if he complies with the mining laws in all respects. Section 5 of the Act, involved here, provides the procedure for establishing who is to manage the surface resources of unpatented mining claims which had been located prior to the passage of the Act. That determination hinges on

[1] The Act became effective on July 23, 1955.

whether a valid discovery of a mineral in paying quantities has been made.

2. In accordance with the provisions of Section 5, a request was made by the Chief of the Forest Service, acting on behalf of the Secretary of Agriculture, for a determination as to whether the United States had the right to manage the surface resources of petitioner's two mining claims[2] (R. 233). Pursuant to the statutory procedures, a notice was published (R. 241–242) and mailed to mining claimants (R. 240), the required certificate of examination was filed (R. 235), as was a certificate of the nonexistence of tract indexes (R. 238). Following departmental regulation, 43 C.F.R. 1852.3-2, notice was given to petitioner by the hearing examiner of the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing was to be held, and the matters of fact and law involved (Pet. App. A73). In response to these notices, petitioner filed a verified statement, showing actual notice (R. 265; Pet. App. A33).

The sole issue at the hearing before the examiner was whether a valuable deposit of minerals had been discovered on either of the two claims prior to July 23, 1955.[3] Most of petitioner's evidence pertained to matters after that date (Pet. App. A52; R. 17), and the hearing examiner ruled that petitioner had not

[2] Timber valued at more than $90,000 is situated on the land involved (Pet. App. A8; Pet App. A19).

[3] The hearing examiner rejected a motion of bias and prejudice as not having been timely filed under 5 U.S.C. 1006(a) (now U.S.C. 556(b) (Supp. III)) (Pet. App. A24–A25).

established a valid discovery prior to that date. The Director of the Bureau of Land Management and the Secretary of the Interior, in turn, affirmed that determination.

In the courts below, petitioner asserted alleged procedural errors and error in the Secretary of the Interior's finding of a lack of "discovery." Both courts, in detailed opinions, affirmed the Secretary's decision.

ARGUMENT

1. As shown by the opinion of the district court, adopted on these points by the court of appeals, the procedure followed by the Department of the Interior complied with all statutory and constitutional requirements. Petitioner emphasizes (Pet. 5, 12) that the district court remarked that he was "technically correct" that no certificate of title or abstract of title had been submitted along with the Agriculture Department's request for publication, as called for by the statute (30 U.S.C. 613(a), *infra,* p. 8). But such certificates or abstracts are, under the Act, to be "based upon * * * tract indexes in the county office of record * * * *if any* * * *" (*infra,* pp. 8–9) (emphasis added). Thus, the district court was on firm ground in holding (Pet. App. A33) that, since there were *no* tract indexes of the lands in question, the submission of certificates of non-existence of tract indexes was sufficient compliance with the Act. Moreover, it is readily apparent that petitioner received notice, was aware of the issue, was heard, and lost his case on the facts. There is nothing presented to warrant review by this Court.

2. The proceedings below applied the principles recently approved by this Court in *United States* v. *Coleman,* 390 U.S. 599. The record supports the factual determination that no valid discovery had been made on these two claims as of July 23, 1955. This was the unanimous conclusion at three levels within the Interior Department and in the two courts below. We rely on the careful analysis by the court of appeals (Pet. App. A4–A15) as demonstrating that, applying the proper legal standards as the Secretary did, the administrative decision is warranted by the record. Re-examination of this question (see Pet. 4, q. 3), is not an appropriate function for this Court.

3. If petitioner believes that he presently has a valid mineral discovery, he may, if he wishes, apply for a patent and have an administrative determination made as to that claim. If successful, he would be entitled to the patent unencumbered by any restrictions of the Surface Resources Act, which applies only to unpatented lands.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1968.

APPENDIX

Statute Involved

The Surface Resources Act of July 23, 1955, 69 Stat. 367, provides in pertinent part:

Section 4 of the Act, 69 Stat. 368–369, 30 U.S.C. 612—

(a) Prospecting, mining or processing operations.

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations of the United States to use of the surface and surface resources.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with pros-

pecting, mining or processing operations or uses reasonably incident thereto: *Provided further,* That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: *Provided further,* That nothing in sections 601, 603, and 611–615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

* * * * *

Section 5 of the Act, 69 Stat. 369–371, 30 U.S.C. 613—

(a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land sur-

veys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the

address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim—

(1) the date of location;

(2) the book and page of recordation of the notice or certificate of location;

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an

affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

* * * * *

(c) Hearings.

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing* shall be set as shall be necessary to

* So in original. Probably should be "hearings".

comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecing public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

* * * * *

(e) Failure to deliver or mail copy of notice.

If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

U.S. GOVERNMENT PRINTING OFFICE: 1968